(11) (8) (6)

Nos. 87-2012, 87-2051, and 88-[illegible]

In The
Supreme Court of the United States
October Term, 1988

NO. 87-2012
FW/PBS, INC., et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 87-2051
M.J.R., INC., et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 88-49
CALVIN BERRY, III, et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE CHILDREN'S LEGAL FOUNDATION

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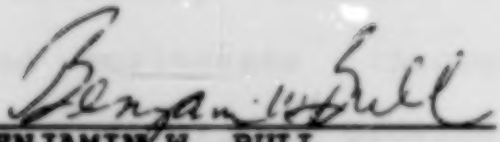
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Children's Legal Foundation, Inc. (CLF), respectfully moves for leave to file the attached brief amicus curiae. The consent of the attorney for Respondents has been obtained. The consent of the attorney for Petitioner was requested telephonically. He failed to respond, so it is assumed that consent is refused.

The interest of the amicus curiae is set out below.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc., formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CLF exists to assist public officials in the enforcement and drafting of constitutional obscenity and pornography laws. It also provides legal assistance to cities and counties seeking to eradicate the "secondary effects" of sexually oriented businesses through zoning ordinances. CLF also provides public information on legal and social issues related to pornography. CLF has a legal staff of attorneys practicing exclusively in the First Amendment area.

CLF attorneys assisted in the drafting of the challenged Dallas ordinance, and have drafted numerous other similar ordinances. CLF has filed more than 50 briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing over 100,000 supporters.

Children's Legal Foundation is profoundly concerned about the ability of communities to regulate illegal conduct and public health hazards created by sexually oriented businesses. It believes that the Dallas ordinance is a constitutional method of combatting these problems, and is necessary to the maintenance of a society where families and children are safe to walk the streets of their cities.

I. INTRODUCTION

A strong First Amendment is perhaps our nation's most vital guarantor of continued liberty. Any legislative incursion into freedom of speech must therefore be closely scrutinized. Nevertheless, the mere invocation of the terms "prior restraint" and "free speech violation" should not settle the issue. This Court must first determine whether speech rights are truly at stake.

Petitioners would like this Court to focus exclusively on the important and grand principles of the First Amendment. Amicus Curiae CLF respectfully suggests that this Court would be better served in directing its attention to the cold, hard, sordid facts relevant to this case. Those facts relate to the harmful secondary effects flowing from the illegal conduct occurring on the premises of sexually

oriented businesses. This type of ordinance is directed at those effects, and not at speech.

The truth is that these sexually oriented establishments are not in the business of communicating ideas, they are in the business of communicating diseases to the community. Their owners do not care about free speech, but about fast cash. They are in the business of catering to the base sexual gratifications of others, for profit. That desire for immediate gratification is what leads "customers" of sexually oriented businesses to engage in dubious, often illegal behavior on the premises.

CLF requests that this Court take a few moments to review the Appendices to this brief, which are transcriptions of videotapes relating to the interior of these establishments. These videotapes

graphically depict the "atmosphere" of a typical sexually oriented business: the male and female prostitutes turning tricks 24 hours per day; the overpowering smell of bodily fluids; the semen, urine and feces on the floors and walls; the anonymous sexual activity occuring through holes in the wall, etc. That is what this case is truly about. For the sake of the community's health, morals, safety and general welfare, these breeding grounds for the transmission of sexual diseases must be closely regulated.

II. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE REQUIREMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY PROVIDING FOR DENIAL OR REVOCATION OF A LICENSE ON THE BASIS OF CERTAIN PRIOR CRIMINAL CONVICTIONS.

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with

certain specified convictions act as an unconstitutional restraint on expression. This contention is without merit.

There is clearly no constitutional impediment to requiring sexually oriented businesses to obtain licenses.[1] The Ordinance denies licenses to persons convicted of certain crimes that are related to the crime-control intent of

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[1] Young v. American Mini Theatres, 427 U.S. 50, 62 (1976) ("The mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not sufficient reason for invalidating these ordinances"); Shuttlesworth v. City of Birmingham, 394 U.S. 147 150-51 (1969); Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 430 (1927)("The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power ..."). See also Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980) (court relied on Young v. American Mini Theatres to uphold license requirement for operation of adult bookstores).

the law.[2] Individuals convicted of misdemeanors become eligible for a license two years after conviction or end of confinement, whichever is later; and for felonies or multiple misdemeanors the period is five years. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 n.23 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986). Petitioners argue that this licensing requirement acts as an unconstitutional prior restraint on the expressive activities of those

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[2]These are prostitution, obscenity, sale, distribution, or display of harmful material to a minor, sexual performance by a child, possession of child pornography, public lewdness, indecent exposure, indecency with a child, sexual assault, aggravated sexual assault, incest, solicitation of a child, and harboring a runaway child. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1304 n.19 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061, 1082 (N.D. Tex. 1986).

denied a license for past criminal behavior. This argument is utterly without merit.

A. The License Requirement is Content-Neutral and Bears a Substantial Relationship to the Purpose of the Ordinance.

Like the Renton ordinance in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), the Dallas Ordinance is content-neutral. The Dallas City Council adopted the Ordinance after making a number of factual findings. It found that crime rates are 90% higher in adult districts. The Council concluded that safety required regulation of sexually oriented businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature," and because there had been a substantial number of arrests for sex-related crimes near these

businesses. They also found convincing evidence that these businesses cause "urban blight" and decreased property values. FW/PBS, 837 F.2d at 1301. Indeed the Ordinance recites that its purpose is to "promote health, safety and morals," and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment." The City also considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime, and property values. In order to prevent increased crime, blighting, and declining property values, the Ordinance was enacted. Id. at 300.

Thus, it is content-neutral in the same way as the Detroit ordinance in

Young v. American Mini Theatres, supra, and the Renton ordinance in City of Renton. These two cases recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. They also hold that sexually explicit materials enjoy less First Amendment protection than other kinds of speech. City of Renton, 475 U.S. at 49 n.2, quoting American Mini Theatres, 427 U.S. at 70 (sexually explicit speech is afforded the lowest rung of First Amendment protection).[3] And because

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[3]This is consistent with other related cases. Patently offensive references to sexual organs and activities "surely lie at the periphery of First Amendment concern." FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); and see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). More recently, the Court in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-9, n.5 (1985), observed (Footnote Continued)

the Ordinance, like the City of Renton ordinance, regulates only the "secondary effects" of sexually oriented businesses, it need only meet the standards applicable to time, place, and manner restrictions. It need not comply with more stringent limits on regulation aimed at content of speech such as those discussed in Freedman v. Maryland, 380 U.S. 51 (1965). Like the ordinance in City of Renton, this Court requires only that the Dallas Ordinance be "designed to serve a substantial governmental interest" and allow for "reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50.

(Footnote Continued)
that, "We have long recognized that not all speech is of equal First Amendment importance . . . [c]ertain kinds of speech are less central to the interest of the First Amendment than others..."

Since this Court did not grant a writ of certiorari on the question of whether the Ordinance provides "reasonable alternative avenues of communication," the issue before this Court is whether the licensing scheme is "designed to serve a substantial governmental interest." It clearly does. Like the City of Renton ordinance, the Dallas Ordinance is designed to serve the City's interest in maintaining "the quality of urban life." Id. at 50. This interest is advanced even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the Renton license requirement and the city's justification for enforcing it are the same as for the Dallas Ordinance's locational zoning rules. Whether a license is denied because the business

is improperly located or because the business is improperly maintained, the effect is the same -- the operator must refrain from the activity. His only alternative is to comply with the ordinance and obtain a license. Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980) (licensing requirements are to be treated under the same analysis as zoning); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 and 1060 n. 5 (licensing requirement for content-neutral nude dancing ordinance tested under "time, place, and manner" analysis). Indeed, the "time, place, and manner" doctrine has never been limited to regulation of "place." FW/PBS, Inc., 837 F.2d at 1304.

The City's findings amply demonstrated a compelling interest in limiting the involvement of specified convicted persons in the operation of

sexually oriented businesses. They documented the strong relationship between sexually-oriented businesses and sexually related crimes. And the City established a compelling justification for barring those prone to such crimes from the management of these businesses.

Moreover, the City's findings are supported by the accepted rule that the government may attach to criminal convictions disabilities aimed at preventing recidivism. See De Veau v. Braisted, 363 U.S. 144, 158-59 (1960) (plurality opinion)("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (holding that the First Amendment permits revocation of theatre license for violation of law against

sexually explicit screenings), cert. denied, 422 U.S. 1044 (1975). Indeed the Supreme Court's recent decision in Fort Wayne Books, Inc. v. Indiana, ___ U.S. ___, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989), reaffirmed this doctrine emphatically. There the Court upheld closure, and forfeiture to the state, of an entire bookstore as punishment for an obscenity conviction. The Court rejected an argument similar to Petitioners' -- that closure of a sexually oriented business as punishment for an obscenity RICO conviction was an unconstitutional prior restraint. The Court held that the restraint on presumptively protected speech activities was not an unconstitutional prior restraint. And see discussion FW/PBS, Inc., 837 F.2d at 1305 (occupational limitations frequently follow criminal conviction, and can

include First Amendment activities such as labor organizing).

The license ineligibility resulting from certain convictions is clearly suitably tailored to achieve the stated purpose of the Ordinance. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.[4]

B. As a Content-Neutral Regulation, the License Scheme Does Not Result in an Unconstitutional Prior Restraint.

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[4]The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses include kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." Dumas, 648 F.Supp. at 1074.

Where, as in the instant case, the purpose of the license restriction is unrelated to the incidental prohibition on expressive conduct, no unconstitutional prior restraint occurs. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), is squarely on point. There the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. Id. at 702. As in the instant case, the criminal conduct was prostitution. The Court made clear that where the purpose of the statute is unrelated to the suppression of speech (i.e., content-neutral), the incidental restraint on expressive conduct is not unconstitutional. And see Commonwealth v. Croaton Books, 323 S.E.2d 86, 89 (Va. 1984) (upheld closure of sexually oriented business based on evidence of

illegal homosexual activity on the premises). If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied a license. See 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the Ordinance is to prevent crime; its purpose is not to suppress speech. Incidental impact on expressive conduct is not an unconstitutional prior restraint. Arcara, supra.

Indeed, merely alleging as Petitioner does that something is an unconstitutional prior restraint on free

speech does not advance this Court's inquiry in any meaningful way. As this Court stated in Kingsley Books v. Brown, 354 U.S. 436, 441-42 (1957):

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539."

Analyzing the instant case in this way, as suggested by the Court in Kingsley Books, is useful. If a bookseller, having fallen behind on his property taxes, loses his business license and is

forced to close his store, it is absurd for him to complain that the city has imposed an unlawful prior restraint upon his bookselling activities. If a bookseller is convicted of the crime of distributing obscene materials, child pornography, or prostitution, he may be imprisoned. But it is absurd for him to argue that his incarceration constitutes a prior restraint on his ability to disseminate protected speech, even though his speech is quite clearly restrained by his inability to operate the bookstore. The same is true in the instant case because the restraint on expressive activities is incidental to, and not the purpose of, the Ordinance. And see Arcara, supra

Contrasting Near v. Minnesota, 283 U.S. 697 (1931), relied on by Petitioners, with the instant statute is instructive. The State of Minnesota had

commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an impermissible prior restraint. The Court placed great emphasis on the fact that the object of the Minnesota statute

was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the instant case, not the least of which is that Near dealt with speech critical of public officials rather than speech of a sexually explicit nature.[5] Most significantly, however, the Near injunction, as well as the injunction in Vance v. Universal Amusement Co., 445 U.S. 308 (1980), was based on the content of the publication. In the case of license revocation for conviction of a crime or non-payment of taxes, or imprisonment for conviction of a crime,

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[5]Sexually explicit speech is afforded the lowest rung of First Amendment protection. City of Renton, 475 U.S. at 49 n.2; Young v. American Mini Theatres, 427 U.S. at 70. Political speech is on the highest rung. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

the incidental restraint on future expression is not based on the content of that expression.[6]

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'"

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[6]The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Police Dept., of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.) The Ordinance, including the licensing regulation, is a time, place, and manner statute which is content-neutral. Its purpose is not content control but the elimination of crime, blight, and reduction of property values, which are the secondary effects of sexually oriented businesses. The focus of the statutory measure is on elimination of the secondary effects, unrelated to the content of the sexually explicit speech sold in the businesses. And like closure incidentally resulting from an illegal activity on the premises -- such as prostitution (Arcara, supra) -- the denial of a license to operate because of that conviction is not an unconstitutional prior restraint. Its

purpose is not to suppress speech but to prevent increased criminal behavior in and around sexually oriented businesses. See, e.g., State ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho 1981), jurisdiction noted 454 U.S. 1140 (1982), appeal dismissed by Appellant U.S. Marketing, Inc., 455 U.S. 1009 (1982).

III. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE DOES NOT UNCONSTITUTIONALLY SINGLE OUT PERSONS AND BUSINESSES ENGAGED IN FIRST AMENDMENT ACTIVITIES FOR REGULATION CONTRARY TO ARCARA V. CLOUD BOOKS

Petitioners argue that because the Ordinance, especially its license provisions, singles out sexually oriented businesses, it is unconstitutional under the First Amendment. Petitioners primarily rely on their own characterization of Justice O'Connor's concurring opinion in Arcara

v. Cloud Books, Inc., supra. Petitioners' argument is utterly without merit.

This Court has categorically resolved this issue against Petitioner. In Young v. American Mini Theatres, supra, the Court considered whether a classification based on the sexually explicit content of material sold at a certain location passed constitutional muster as a content-neutral time, place, and manner regulation.

> "The principle question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment."

427 U.S. at 52. The Court upheld the classification based upon sexually explicit but protected speech. The Court ruled that "[r]easonable regulations of the time, place, and manner of protected speech, where those

regulations are necessary to further significant governmental interest, are permitted by the First Amendment." Id. at 63 n.18.[7] In specifically addressing content-based licensing, the Court stated:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances."

Id. at 62 (emphasis added). The Court specifically held that the content of sexually explicit material could be the basis for separate classification and

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[7]The Court cited Kovacs v. Cooper, 336 U.S. 77 (1948) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

treatment under a licensing and zoning statute.

> "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."

Id. at 70-71.

> "[E]ven though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."

Id. at 71.

In City of Renton, supra, the Court reaffirmed its holding in Young, ruling that a classification based upon the content of sexually explicit material does not violate the Equal Protection Clause. 475 U.S. at 55, n.4. The Court held that this type of classification is

a valid content-neutral time, place, and manner regulation because it serves a substantial governmental interest and is "justified without reference to the content of the regulated speech." Id. at 48, quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Lower courts have followed the Supreme Court in upholding licensing of commercial establishments dealing in sexually oriented material. For example, Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980), upheld a Peoria license ordinance making "it unlawful for anyone to operate an adult bookstore in Peoria without first obtaining a license." Under a constitutional challenge similar to the instant case, the Seventh Circuit held that "under Young v. American Mini Theatres, Inc., supra, 427 U.S. at

62-63, 96 S.Ct. at 2448, the requirement of a license is also constitutional."

> It is rationally related to the goal of "inverse," or scatter zoning of adult uses; it provides both a method for authorities to enforce scatter zoning and means of assuring those who seek to open a new adult use of the legality of the proposed site.

Id. Similarly see Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F.Supp. 1359, 1368 (N.D. Tex. 1986), aff'd 837 F.2d 1268 (5th Cir. 1988); O'Day v. King County, 749 P.2d 142 (Wash. 1988); Schope v. State, 647 S.W.2d 675 (Tex.Civ.App. 1982); Airport Bookstore, Inc v. Jackson, 248 S.Ed.2d 623 (Ga. 1978).

Finally, contrary to the contention of Petitioners, the fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court

stated in Young and City of Renton. The Ordinance is a valid legislative decision by the City to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." Young, 427 U.S. at 82, n.6 (Powell, J., concurring).

IV. THE ORDINANCE PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS AND IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners argue that the Ordinance's procedural safeguards are inadequate to prevent the licensing requirements from acting as a prior restraint. This argument is without merit.

Petitioners contend that the Ordinance is governed by and fails to meet the standards of Freedman v. Maryland, 380 U.S. 51 (1965). However, Petitioners' assertion misses the mark

because the Freedman standard does not apply to a content-neutral statute such as the Dallas Ordinance. FW/PBS v. City of Dallas, 837 F.2d at 1303; Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 1986); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979). As noted by the court below, after the City of Renton decision, a content-neutral ordinance which regulates the effects of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulation aimed at content." FW/PBS, 837 F.2d at 1303.

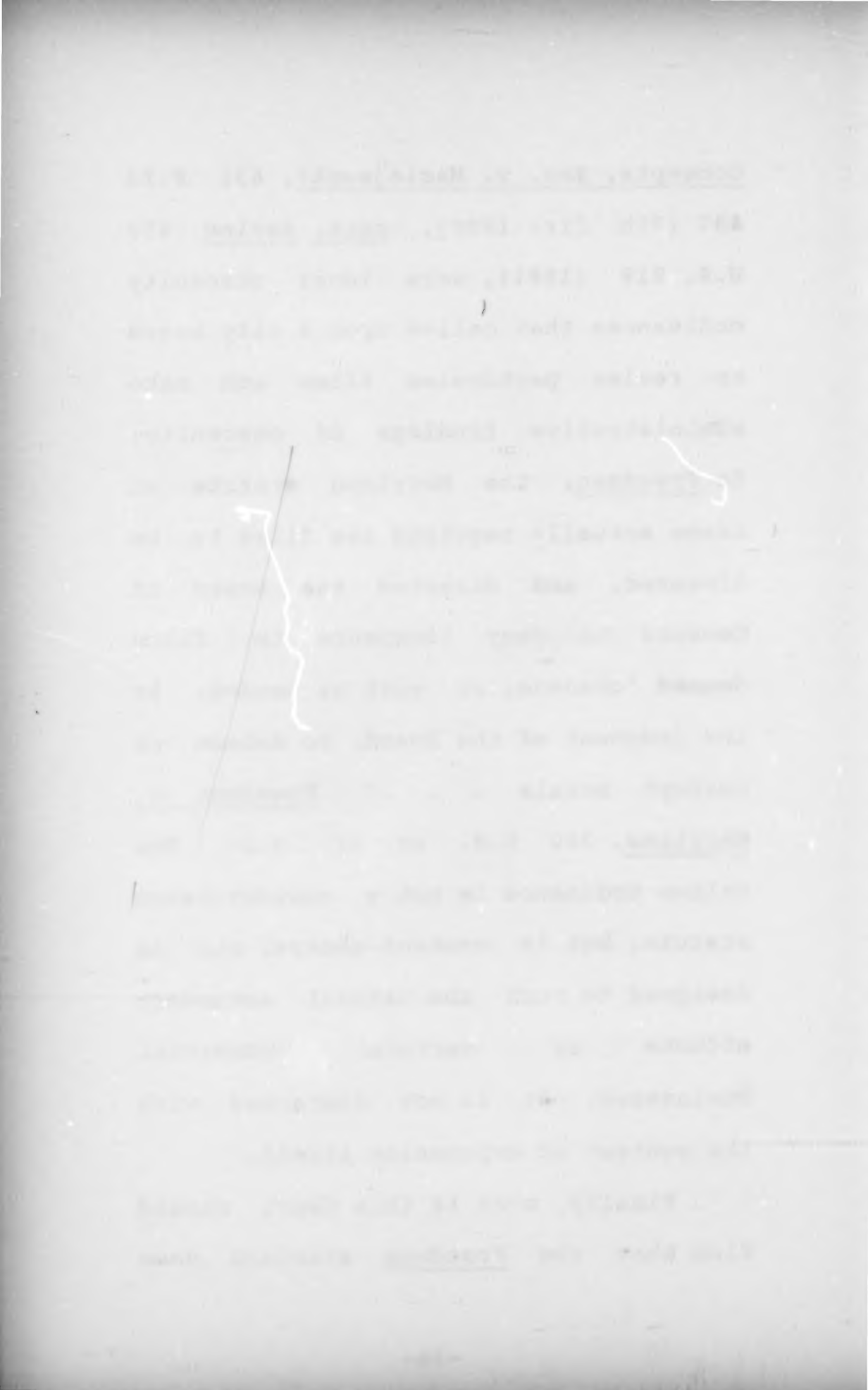
As discussed previously, First Amendment protection for nonpornographic expression is greater than that afforded sexually explicit speech. City of

Renton, supra; Young, supra. Further, the actual issue here is the effect sexually oriented businesses have on their surroundings, not the content of the sexually explicit speech itself. This is contrasted with Freedman where the only issue was the explicit content of a particular film. What is being addressed here is not a particular movie; rather, it is the detrimental impact on surroundings caused by long-term sexually oriented commercial businesses.

The cases cited by Petitioners in support of their Freedman argument are easily distinguishable. Each of them involves content-based regulations whose only purpose was suppression of speech. The regulations involved in City of Paducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986), cert. denied 93 L.Ed.2d 290 (1986), and Entertainment

Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919 (1981), were local obscenity ordinances that called upon a city board to review particular films and make administrative findings of obscenity. In Freedman, the Maryland statute at issue actually required the films to be licensed, and directed the Board of Censors to deny licensure to films deemed "obscene, or such as tended, in the judgment of the Board, to debase or corrupt morals . . ." Freedman v. Maryland, 380 U.S. at 52, n.2. The Dallas Ordinance is not a content-based statute, but is content-neutral and is designed to curb the harmful secondary effects of certain commercial businesses. It is not concerned with the content of expression itself.

Finally, even if this Court should find that the Freedman standard does



apply to content-neutral, time, place, and manner ordinances, the Dallas statutory scheme satisfies Freedman. As the District Court below held:

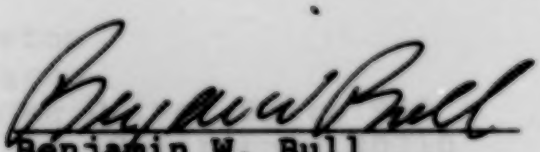
> "The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process."

Dumas v. City of Dallas, 648 F.Supp. at 1075.

V. CONCLUSION

For the foregoing reasons, this Court should uphold the Dallas Ordinance licensing provisions in their entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 20th day of July, 1989, to:

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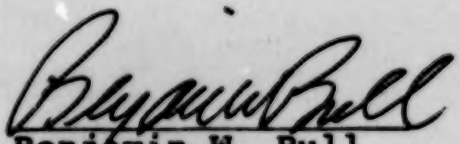
All parties required to be served have been served.



Benjamin W. Bull
Counsel for
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APPENDIX A

TRANSCRIPTION OF VIDEOTAPE RELATING TO THE INTERIOR OF SEXUALLY ORIENTED BUSINESSES WITH ALAN SEARS, EXECUTIVE DIRECTOR OF CHILDREN'S LEGAL FOUNDATION AND DET. VINCENT RIZZITELLO, OF THE FT. LAUDERDALE POLICE DEPARTMENT, ORGANIZED CRIME DIVISION. (A copy of this video tape has been lodged with the Clerk of Court.)

Mr. Sears: We have a film that you brought from Florida with us today that we would like to take a quick look at. Vince, I would like you to tell the officers who are listening to this tape, I know there is a real different level of experience between those that are watching this tape, between those who have been deeply involved and who have briefly ~~been~~ involved. I would like you to tell us a little about what goes on in these porn outlets.

Det. Rizzitello: Basically, several years ago in one of our investigations, we got a court order to go inside one of

our adult bookstores and video the inside because we could not get a judge to go down and see it for himself so we wanted to represent to him exactly what the atmosphere was like.

What you are seeing now is the back room where the videos are played and the 8 mm movies and this is a marquee section. Basically, it shows films that are offered for viewing in each booth and the customer would go in, you can see there is about 150 films there, decide what film he wanted to view and then go to that particular numbered booth and drop his quarter so he could view about 2 minutes of that film.

Mr. Sears: Now, you have a lot of light in here for your television film. What is the normal situation in these back rooms.

Det. Rizzitello: The way that area was lit up was basically because of our camera that we had. Normally it is a black light atmosphere and you basically have to feel your way around this area. Again, these people knew we were coming so the patrons were removed and it is very sanitary right now. I wish I could bottle the smell or the feeling when you walk in there -- there is just no way of representing it on a piece of tape like this. That is why we wanted the judge to experience it but second best, we got a piece of film that we could have the judge look at and try to interpret it to him basically what these areas are. That they are really masturbation parlors.

Mr. Sears: And in addition to masturbation, other types of sexual activities take place.

Det. Rizzitello: Absolutely, these are the booth's doors, so once you leave the marquee, the patron would find a particular booth he was interested in.

Mr. Sears: This looks like a pretty good size place. What have we got 25 or 26 booths?

Det. Rizzitello: This has 50 booths. This is just one side of it. These booths on this side are mainly smaller booths where maybe one or two people could get in together and on the other side was called the group booths where you get 5 or 6 people. Right now you are looking at a long hallway shot. Normally, this is crowded with individuals going from one booth to the next booth.

Mr. Sears: What is this we are looking at now?

Det. Rizzitello: You are looking at the screen. This is the screen when the customer goes in, he closes the door and the film is shown on the screen. The stains you see on the wall are semen stains, there is no doubt. This is what people do, they go in there and watch a sexually explicit film, they masturbate or they participate in sex with someone else. That is exactly what they are for. These are not for connoisseurs of adult-type films who go in and critique them. This is raw sex.

Mr. Sears: What is this you are pointing to, this writing on the wall?

Det. Rizzitello: This is a normal technique used for advertising for

Mr. Seaton: What is this we are looking at now?

Det. [illegible]: You are looking at the screen. This is the screen when the customer goes in, he closes the door and the film is shown on the screen. The stains you see on the wall are semen stains, there is no doubt. This is what people do, they go in there and watch a sexually explicit film, they masturbate or they participate in sex with someone else. That is exactly what they are for. These are not for advertisements of adult-type films and so on that catalogue items. This is the end.

Mr. Seaton: What is this you are pointing at, this writing on the wall?

Det. [illegible]: This is a normal technique used for advertising the

people to advertise their particular perversion hoping someone will respond. Again, the stains on the wall are the evidence itself on what actually occurs in these booths. The owners will claim that all that occurs is movie viewing, but they are cesspools.

APPENDIX B

Newscenter 13

Eau Claire, Wisconsin

(A copy of this video tape has been lodged with the Clerk of Court.)

Reporter: Tonight on "AIDS In A Small Town" we continue to tell you the story of a man we call Rick. Tonight the story is of a man spreading a virus.

Rick: I will never tell anyone what I have. That is kind of stupid.

Reporter: Why is that?

Rick: It kills your sex life.

Reporter: We have introduced to you a man we are calling Rick. Rick is homosexual, he lives in Eau Claire, and he carries the AIDS virus. What we haven't told you yet is that he claims

to be spreading the virus by having anonymous sex with other men. Does that bother you at all that you are spreading the disease?

Rick: No, I look at it as to the point that in riding in a car. If you get into a car with somebody and there is a seatbelt available to you and you don't use it and you get killed, whose fault is it? To a point I feel a little guilty but I always have condoms and if no one wants to use them or no one suggests it then hey, whose fault is it?

# # #

Harlan Heinz, Psychologist: It is not much different from the killer, the person who goes around murdering people without a conscience. I think that is a similar kind of lack of character

development. I think that that is an exception. Some people who feel that they are going to die in a few years would have this attitude. But I think that's few, I think that's an exception and it is a person without a conscience or without any kind of feeling for the welfare of mankind.

# # #

Dr. Michael Finkel: Anyone who continues to behave irresponsibly in such matters should have some sort of penalty. There should be some way that we can stop these people.

# # #

Dr. Ken Alder: This is really distressing. I think that a person who does these things is very definitely a risk to other peoples' health.

♦ ♦ ♦

Harlan Heinz, Psychologist: It is very difficult to treat a person like this and I think that basically you would not be able to cure this person. This mind would be very difficult to reach.

♦ ♦ ♦

Reporter: Right now, Wisconsin has no law specifically against the spreading of AIDS. But there could be a law coming very soon.

Gov. Tommy Thompson: I don't know if we want to classify it as a felony but I am certainly looking at some sort of criminal sanctions.

Reporter: Can you get specific at all?

Gov. Tommy Thompson: We haven't really resolved or made a final decision on it. We are looking at a lot of legislation this year to protect the citizens...

# # #

Reporter: Rick says if Thompsons's administration gets a law approved restricting the spread of AIDS, he will obey it. But until then he will continue his lifestyle and that includes anonymous sex with other men.

How are you doing that, where all do you have sex?

Rick: Basically, I go to all the bookstores.

Reporter: Eau Claire's adult bookstores show adult movies inside private booths.

Booths no larger than a small closet. But in many of the booths, there are small holes made in the walls. The holes are about waist high off of the floor.

Who do you meet in these rooms?

Rick: I have seen a few married men in there.

Reporter: Do you have most of your sex in adult bookstores?

Rick: Yeah.

Reporter: Is that the easiest way for you to have sex is through these holes?

Rick: Very easy.

# # #

Reporter: You have a hole in one of your booths. Why is that hole there?

Bookstore owner: That hole was there when the booth came down here from Chicago. And it has been there ever since I have had that booth and I have had that booth there since 1984 when they came in here with all that stuff.

Reporter: Glen Peterson runs an adult bookstore in Eau Claire. The hole in one of the booths looks as if a knot of wood was punched out. Peterson said he has tried to block it twice but he has given up because it has been repeatedly removed. Today we told him Rick's story of spreading the virus.

Does that make you want to get rid of the hole more?

Bookstore owner: Yeah. I think that I will make sure I can patch this up good where they can't tear it down again because I don't want to get sued if somebody else catches AIDS over this. So I am going to have to take care of it today, I guess.

Reporter: And although it seems Glen Peterson knows what he is going to do, the City of Eau Claire sure doesn't seem to. City Attorney Ted Fischer says there is no ordinance on the books dealing with the issue at this time, though Milwaukee and St. Paul do. And Councilperson Wally Rogers says it may be up to the Health Board to take action but Health Board President Tom Henry says it might be up to the city to have an ordinance first. We will have more on that as our series continues.